STATE OF MICHIGAN

COURT OF APPEALS

KEN HOLDINGS, LLC,

Plaintiff-Appellee/Cross-Appellant,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellee,

and

MICHAEL J. KAPTURE AND AMERICA ONE KAPTURE INSURANCE AGENCY, INC., a/k/a KAPTURE INSURANCE AGENCY, INC.,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
June 26, 2014

No. 312894
Genesee Circuit Court
LC No. 11-095991-CK

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendants, Michael J. Kapture and America One Kapture Insurance Agency, Inc., a/k/a Kapture Insurance Agency, Inc., (collectively referred to as "Kapture" in this opinion) appeal by leave granted[1] an order granting summary disposition in favor of defendant, Auto Owners Insurance Company (Auto Owners). The order also denied a motion for partial summary disposition filed by plaintiff, KEN Holdings, L.L.C. KEN Holdings has filed a cross-appeal, agreeing with Kapture's argument that the trial court erred in granting Auto Owners' motion for summary disposition, and also asserting that the trial court erred in denying its motion for partial summary disposition. We conclude that the trial court erred in granting summary disposition in favor of Auto Owners but did not err in denying KEN Holdings' motion for summary disposition. Thus, we affirm in part, reverse in part, and remand for further proceedings.

[1] See *KEN Holdings LLC v Auto Owners Insurance Company*, unpublished order of the Court of Appeals, entered August 13, 2013 (Docket No. 312894).

This case arises from a commercial insurance policy issued by Auto Owners to HCSL, Inc., the owner of a building and bar in Flint (the Saginaw Street Property). In 2006, KEN Holdings sold the Saginaw Street Property to HCSL on a land contract. HCSL is owned by Ed and Carrie Wenzel. The land contract required that HCSL insure the Saginaw Street property, and HCSL promptly applied and received insurance through Auto Owners. In the application, HCSL is listed as the applicant. Under a section labeled "Additional Interests," Ed and Carrie Wenzel are listed in a box titled "Entity owning building leased." Also under "Additional Interests," KEN Holdings is listed in a box titled "Contract holder." There is an additional notation identifying KEN Holdings as a "Land Contract Holder."

In 2009, the Saginaw Street property was significantly damaged by a fire. At that time, HCSL's insurance contract with Auto Owners on the Saginaw Street Property was in effect; the contract included coverage for property damage. HCSL filed a claim, but it was denied because Auto Owners contended that Ed Wenzel set the fire intentionally. KEN Holdings also filed a claim, which Auto Owners denied. Auto Owners asserts that KEN Holdings is only entitled to coverage under the insurance policy if HCSL is also covered because KEN Holdings is subject to the same defenses to coverage as HCSL. KEN Holdings asserts that under the policy, it is entitled to coverage even if HCSL is not.

In the commercial property coverage declaration, KEN Holdings is listed with the notation "Interest: Loss Payable," under a heading titled "Secured Interested Parties and/or Additional Interested Parties." An endorsement to the policy, titled "Loss Payable Provisions," provides, in part:

> A. When this endorsement is attached to the STANDARD PROPERTY POLICY CP 00 98 the term Coverage Part in this endorsement is replaced by the term Policy.
>
> The following is added to the LOSS PAYMENT Loss Condition, as indicated in the Declarations or by an "X" in the Schedule."
>
> **B. LOSS PAYABLE**
>
> For Covered Property in which both [the insured] and a Loss Payee shown in the Schedule or in the Declarations have an insurable interest, we will:
>
> 1. Adjust losses with [the insured]; and
>
> 2. Pay any claim for loss or damage jointly to [the insured] and the Loss Payee, as interests may appear.
>
> **C. LENDER'S LOSS PAYABLE**
>
> 1. The Loss Payee shown in the Schedule or in the Declarations is a creditor, including a mortgage holder or trustee, whose interest in Covered Property is established by such written instruments as:
>
> a. Warehouse receipts;

b. A contract for deed;

c. Bills of lading;

d. Financing statements; or

e. Mortgages, deeds of trust, or security agreements.

2. For Covered Property in which both [the insured] and a Loss Payee have an insurable interest:

a. We will pay for covered loss or damage to each Loss Payee in their order of precedence, as interests may appear.

b. The Loss Payee has the right to receive loss payment even if the Loss Payee has started foreclosure or similar action on the Covered Property.

c. If we deny [the insured's] claim because of [its] acts or because [it has] failed to comply with the terms of the Coverage Part, the Loss Payee will still have the right to receive loss payment if the Loss Payee:

(1) Pays any premium due under this Coverage Part at our request if [the insured] have failed to do so;

(2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of [the insured's] failure to do so; and

(3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the Loss Payee.

In the loss payable provisions endorsement, there is a schedule titled "Provisions Applicable," which has three options underneath – "Loss Payable," "Lender's Loss Payable," and "Contract of Sale." It appears that each loss payee, or entity with an interest in the covered property, should be listed in this schedule. However, the schedule is blank.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). "A summary disposition motion under MCR 2.116(C)(10)[2] tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.*, citing *Corley v Detroit Bd of Ed*, 470 Mich 274,

[2] Auto Owners' motions for summary disposition cited MCR 2.116(C)(8) and (C)(10). Although the trial court did not indicate which court rule it granted the motions under, it appears that the court considered evidence outside the pleadings when making its decision. Thus, we review the court's decision under MCR 2.116(C)(10). See *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012).

278; 681 NW2d 342 (2004). "When deciding a summary disposition motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the opposing party." *Id*. In addition, "the proper construction and application of an insurance policy presents a question of law that is reviewed de novo." *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376-377; 836 NW2d 257 (2013), citing *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001).

An insurance policy, like any other contract, is an agreement between the parties. *Tenneco Ins v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). Consequently, the ordinary principles of contract interpretation apply when construing an insurance policy. *Titan Ins Co v Hyten*, 491 Mich 547, 554; 817 NW2d 562 (2012). The goal of contract interpretation is to determine the intent of the parties. *Tenneco*, 281 Mich App at 444. To determine the parties' intent, the insurance contract is read as a whole and the terms given their ordinary and plain meanings. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012); *Dancey v Travelers Prop Cas Co of Am*, 288 Mich App 1, 8; 792 NW2d 372 (2010). In addition, "contract terms should not be considered in isolation and contracts are to be interpreted to avoid absurd or unreasonable conditions and results." *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 297; 778 NW2d 275 (2009). An insurance contract consists of the policy application, declarations, and the policy itself. *Dancey*, 288 Mich App at 8; *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005).

When a contract is clear and unambiguous, it must be enforced as written. *Dancey*, 288 Mich App at 8. A contract is unambiguous if it "fairly admits of but one interpretation." *Id*. "A contract is ambiguous when two provisions irreconcilably conflict with each other, or when a term is *equally* susceptible to more than a single meaning." *Id.* (internal citations and quotation marks omitted, emphasis in original). If an insurance contract's language is clear, its interpretation is a question of law. See *Pioneer State*, 301 Mich App at 376-377. On the other hand, "the meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). When determining the meaning of an ambiguous contract, a jury should consider relevant extrinsic evidence to determine "the contemporaneous understanding of the parties." *Id.* at 469-470 (internal citations omitted). If the jury is still unable to determine the parties' meaning, even after considering relevant extrinsic evidence, then "ambiguities are to be construed against the drafter of the contract." *Id.* at 470-471.

In this case, the relevant language of the insurance policy is found in the loss payable provisions endorsement. Insurance policies frequently contain a loss payable clause that protects lien holders. See *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 383; 486 NW2d 600 (1992). Generally, there are two types of loss payable clauses – an ordinary loss payable clause and a standard loss payable clause. *Id*. At 383-384. An ordinary loss payable clause "directs the insurer to pay the proceeds of the policy to the lien holder, as its interest may appear, before the insured receives payment on the policy." *Id*. At 383. Under this type of clause, a lien holder's "right of recovery is no greater than the right of the insured." *Id*. Under a standard loss payable clause, "a lien holder is not subject to the exclusions available to the insurer against the insured because an independent or separate contract of insurance exists between the lienholder and the insurer." *Id.* at 384. A standard loss payable clause is identifiable by specific language "that

serves to afford coverage to the [lien holder] even when it is not afforded to the insured." *Wells Fargo Bank, NA v Null*, __ Mich App __; __ NW2d __ (2014); slip op at 9; see also *Foremost*, 439 Mich at 383-385, 389.

In this case, the loss payable provisions include both an ordinary and a standard loss payable clause. Under Clause B of the loss payable provisions, the loss payee is only entitled to payment if the insured is entitled to payment. Thus, if the insured's claim is denied because of misrepresentation or fraud, then the loss payee's claim will also be denied. Under Clause C, the loss payee is entitled to payment even if the insured's claim is denied because of its acts or failure to comply with the policy.

Thus, the issue is what clause applies to KEN Holdings. The loss payable provisions refer to a schedule or declaration. The schedule is blank. On the commercial property coverage declaration, under "Secured Interested Parties and/or Additional Interested Parties," KEN Holdings is listed with the notation "Interest: Loss Payable." According to Auto Owners, this notation is dispositive to the question on appeal – because the declaration states KEN Holdings and "Interest: Loss Payable," KEN Holdings falls under Clause B of the loss payable provisions, which is labeled "Loss Payable." However, we disagree and conclude that the insurance contract is ambiguous regarding what effect, if any, the notation "Interest: Loss Payable," has on KEN Holdings' right to recover under the contract even if HCSL is not entitled to coverage. Because the contract is ambiguous on this issue, there is a question of fact and summary disposition was inappropriate. See *Klapp*, 468 Mich at 469.

First, KEN Holdings clearly meets the criteria of Clause C of the loss payable provisions. The application for insurance is part of the insurance contract. *Dancey*, 288 Mich App at 8; *Royal Prop*, 267 Mich App at 715. In the insurance application, KEN Holdings is listed as a land contract holder. Thus, it is "a creditor . . . whose interest in Covered Property is established by such written instruments as . . . [a] contract for deed." Even the trial court stated that there appeared to be a "mistake," and that failure to properly identify KEN Holdings as a lender's loss payable seemed "careless."

Second, the term "loss payable" is not limited to describing an interest under Clause B of the loss payable provisions, and is used frequently and casually throughout the policy. The endorsement itself is called "Loss Payable Provisions," but it includes subsections titled "Loss Payable," "Lender's Loss Payable," and "Contract for Sale." Under "Secured Interested Parties and/or Additional Interested Parties" in the commercial property coverage declaration, Ed Wenzel and Carrie Wenzel, are listed along with the notation "Interest: Loss Payable." Despite this label, the Wenzels are also listed at the top of each page under insured. If the Wenzels are named insureds, then the policy as a whole describes their right to coverage and the loss payable provisions are not necessary to determine their rights. This discrepancy shows that the use of the term "Interest: Loss Payable" is not conclusive evidence of an entity's rights under the insurance contract. For these reasons, it appears that the contract is poorly drafted, and the meaning of "Interest: Loss Payable" is unclear.

Finally, the relationship between the loss payable provisions and the commercial property coverage declaration is unclear. Under Clause B of the loss payable provisions, Auto Owners promises to pay any claim for loss jointly to the insured and a loss payee "shown in the Schedule

or in the Declarations," which has an insurable interest. It uses the term "loss payee" to refer to the entity with an additional interest; it does not use the term "loss payable" (such as "For Covered Property in which both [the insured] and a [Loss Payable] in the Schedule or in the Declarations have insurable interests. . . ."). Similarly, in Clause C, the term "loss payee" is again used to describe an entity with an additional interest – "The Loss *Payee* shown in the Schedule or in the Declarations is a creditor. . . ." (Emphasis added.) In fact, the term "lender's loss payable" is not used anywhere in the text except as a heading to the clause. The overuse and repetition of the same terms, such as loss payable and loss payee, to describe separate interests under the policy contributes to the ambiguity of the contract.

In addition, we note that even if a finder of fact concludes that the parties intended for KEN Holdings to fall under Clause C of the loss payable provisions, KEN Holdings is still not necessarily entitled to coverage. The lender's loss payable provisions states:

> c. If we deny [the insured's] claim because of [its] acts or because [it has] failed to comply with the terms of the Coverage Part, the Loss Payee will still have the right to receive loss payment *if* the Loss Payee:
>
> > (1) Pays any premium due under this Coverage Part at our request if [the insured] have failed to do so;
> >
> > (2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of [the insured's] failure to do so; and
> >
> > (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the Loss Payee. [Emphasis added.]

Thus, KEN Holdings must show that it meets these requirements before it is entitled to coverage. The parties do not address this issue in their briefs; it should be considered on remand.

Because the contract at issue is ambiguous, there is a question of fact regarding KEN Holdings' right to recover under the contract and the trial court erred in granting Auto Owners' motion for summary disposition. See *Klapp*, 468 Mich at 429. For the same reason, the court also did not err in denying KEN Holdings' motion for partial summary disposition.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood